

Service Date: December 16, 1985

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER of the Application )	TRANSPORTATION DIVISION
OF TOM AVERILL, Red Lodge, Montana, )	
d/b/a WASTE AWAY, for a Class D )	DOCKET NO. T-8643
Certificate of Public Convenience )	
and Necessity. )	ORDER NO. 5651

\* \* \* \* \*

FINAL ORDER

\* \* \* \* \*

APPEARANCES

FOR THE APPLICANT:

Paul D. Miller and Robert C. Reichert, Holland & Hart, Suite  
1400, 175 North 27th Street, Billings, Montana 59101

FOR THE PROTESTANT:

Gary M. Zadick, Alexander & Baucus, 414 Strain Building, P.O.  
Box 2629, Great Falls, Montana 59403

FOR THE COMMISSION:

Robert A. Nelson, Robin A. McHugh, Staff Attorneys, 2701  
Prospect Avenue, Helena, Montana 59620

BEFORE:

THOMAS MONAHAN, Commissioner and Hearing Examiner

BACKGROUND

1. On February 1, 1985, the Commission received an application from Tom Averill, d/b/a Waste Away (Applicant) for a Class D Certificate of Public Convenience and Necessity authorizing the transportation of garbage and solid waste between all points and places within Carbon County, Montana.

2. The Commission received written protest to the application from D&F Sanitation (D&F) and Karl Gaustad. D&F holds a Class D operating authority which includes all of Carbon County. Gaustad holds a Class D operating authority which overlaps in part the authority applied for in this case.

3. Following issuance of proper notice, the Commission conducted a public hearing on July 10, 1985, in the City Chambers, City Hall, Red Lodge, Montana.

4. At the beginning of the hearing, Applicant orally requested to amend the application to clarify that if the authority applied for were granted, then Tom Higham, owner and lessor of Applicant's present authority, would surrender or retire his certificate. The Commission accepted the amendment.

5. At the conclusion of the hearing, the parties stipulated to a final order, pursuant to 38.2.4802(2) of the Commission's Procedural Rules.

SUMMARY OF TESTIMONYTestimony of Applicant

6. Mr. Tom Averill, owner and financial manager of Waste Away, testified in support of the application. Mr. Averill has been a resident of Red Lodge for 11 years and was the owner of the Red Lodge Zoo. Presently he operates the only movie theater in Carbon County. He placed his net worth at \$498,000. He maintained that Waste Away's equipment was in good operating condition and includes:

- 1979 International: 20-yard capacity;
- 1979 International: 20-yard capacity;
- 1985 Ford: 6-yard capacity;
- 1977 White tractor;
- 1980 Trailer: 65-yard capacity.

Mr. Averill noted that the small size trucks used by Waste Away are well suited to garbage pickup in rural areas because they can be handled easily on narrow rural roads and do not harm unpaved driveways in the wet seasons.

7. Mr. Averill stated that Waste Away would be ready to provide the services sought within 30 days of the granting of this application. Further, Waste Away would provide service on a daily basis, including weekends, 12 months a year for both residential and commercial customers. Waste Away maintains an office in Red Lodge, as well as a local telephone number. Currently, Waste Away uses a landfill in Bridger, Montana, without a per account charge for the disposal of its collected waste.

8. Mr. Averill stated that Waste Away was not making a profit at 145 accounts but that it could be profitable with twice that number.

9. The Applicant offered the following exhibits which were admitted into evidence at the hearing:

- A: Waste Away equipment list;
- B: Waste Away financial statement;
- C: Waste Away customer list;
- D: Map of Carbon County;
- E: Notes of satisfaction from present Waste Away customers.

10. Mr. Tom Higham, the equipment operator and maintenance specialist for Waste Away, testified in support of the application.

Mr. Higham is a Carbon County native and has collected garbage in Red Lodge for over five years. He stated that the communities of Red Lodge, Fromberg, Bridger, and Joliet in Carbon County provide garbage service to their residents. There are, however, between 2,000 and 4,000 residents of Carbon County who live outside these communities. Of this potential market D&F has between 200 and 250 customers; Waste Away has 145 accounts in the 10-mile radius around Red Lodge.

#### Testimony of Shipper Witnesses

11. Mr. Frank Cole, a Carbon County Commissioner, testified that he knows some Carbon County residents who bury their garbage on their property, take it illegally to Stillwater County

dumpsites, or place it in dumpsters belonging to Red Lodge city residents. Mr. Cole, a resident of East Rosebud, stated that he was not aware that D&F could provide service to the Rosebud area.

He maintained that there is great need for garbage service in East Rosebud.

12. Mrs. Betty Thiel, a resident of Luther, Montana, Carbon County, testified that she was not aware that D&F provided service to her area. She stated that she has never had garbage service but would like it. She also claimed to know of others who would like such service.

13. Mrs. Lois Jordan, a Carbon County resident living in the Roberts area, stated that she was not aware that D&F could provide garbage service to her area. She maintained that she would like to have garbage service.

14. Mrs. Bonnie Fiffer, a resident of Roscoe in Carbon County testified that she was not aware that D&F provided garbage service in her area and that she greatly desired garbage service.

15. Mrs. Frank Klessens, a Carbon County resident, testified that she desired garbage service and was unaware that D&F could provide it in her area. She stated that the local school was without garbage service and was greatly in need of it. Presently, parents of school age children share the disposal of school garbage. Mrs. Klessens had used the services of Karl Gaustad until he discontinued service to her residence 10 years ago.

16. Mr. Scott Davidson, who resides near Roberts in Carbon County, testified that he would like to have garbage service. He stated that he has had difficulty receiving service at his home since he lives two miles from a paved road. However, he was not certain that D&F had ever refused him service and admitted that he never contacted D&F's office to request service.

17. Mrs. Ed Winter, who lives near Luther in Carbon County, testified that she was not aware that D&F provided service to her area. She stated that she greatly desired garbage service.

18. Mrs. Mary Anne Yates, a Carbon County resident who lives near Luther, testified that she greatly desires garbage service and knows of the need for garbage service in her neighborhood. She was not aware that D&F is licensed to provide such service.

19. Mr. Gary Croft, a contractor working near the Roberts area of Carbon County, testified that he had been a subscriber to D&F's service but discontinued it because of poor service. He admitted, however, that he never complained to D&F about the service.

20. Mr. Jake Foster, president of the United States National Bank of Red Lodge, testified that Tom Averill has a net worth of approximately \$498,000. Further, he stated that Averill's credit is good and that Waste Away has a credit line sufficient to meet foreseeable needs.

21. Mr. Dave Malin of Red Lodge testified that he had been a customer of D&F but cancelled because it did not offer service twice a week. He admitted, however, that he had not attempted to make other arrangements with D&F. He stated that he prefers the service offered to him by Waste Away.

22. Mr. Dick Steffans, a Carbon County Commissioner from Red Lodge, testified that he has received complaints from constituents about D&F's service. He admitted, however, that such complaints have been rare. Mr. Steffans said he would welcome competition in the garbage business.

23. Mr. Jerry Carlson, a Red Lodge contractor, stated that he used to haul his own garbage but has recently hired Waste Away. He stated that he had never contacted D&F.

#### Testimony of Protestants

24. Mr. Karl Gaustad, a resident of Absarokee in Stillwater County, testified in opposition to the application. Mr. Gaustad currently holds a Class D permit to haul garbage within a 35-mile radius of Absarokee, which includes a portion of Carbon County. Mr. Gaustad has not served Carbon County for over 10 years and does not plan to solicit business there. He would, however, be able to provide service in Carbon County.

25. Mr. Bob Dunker, owner of D&F Sanitation, appeared and testified in opposition to the application. Mr. Dunker stated that

D&F has been in the garbage business for 15 years and has served Carbon County for 11 years. D&F can provide service for all types of residential and commercial containers including large roll-off boxes. In addition, D&F will pick up large items that do not fit within a container, although an extra cost may be assessed for this service. D&F's residential rate in Carbon County is \$8.50 per month with no limit on the number of containers. D&F serves Carbon County with one truck two days per week.

26. Mr. Dunker testified that D&F's routes crisscross the highways running through Carbon County. D&F serves customers who live off the main highways, and Mr. Dunker asserted that there is not any area in Carbon County which D&F will not serve.

#### DISCUSSION, ANALYSIS, AND FINDINGS

27. Parties desiring to haul garbage for hire are required to first obtain a Class D certificate of public convenience and necessity from the Commission. Section 69-12-314, MCA.

28. In considering applications for operating authority, the Commission is governed by the provisions of 69-12-323, MCA.

Paragraph (2) of that section provides as follows:

(2)(a) If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefor shall be issued. In determining



whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

(b) For purposes of Class D certificates, a determination of public convenience and necessity may include a consideration of competition.

29. The Commission has interpreted Paragraph 2(a) as requiring it to address three issues prior to granting additional operating authority (Finding No. 59, Order No. 4296, Docket No. T-6167):

- a) First, the Commission must determine that "public convenience and necessity require the authorization of the service proposed." This necessarily will include consideration of the existing service.
- b) Second, the Commission must consider the ability and dependability of the applicant to meet any perceived additional public need.
- c) Third, the Commission must consider the impact that the proposed service would have upon existing transportation services.

30. In addition, Paragraph 2(b) must be taken into account, wherein the legislature has deemed it proper for the Commission to

consider, inter alia, the concept of competition in determining public convenience and necessity relative to Class D certificates.

The use of the word "may" indicates that such consideration is discretionary on the Commission's part. (For a discussion of the history and meaning of Paragraph 2(b) see Application of Rozel Corporation, Docket No. T-8205, Order No. 5319.)

31. In resolving the first and third issues identified in paragraph No. 29, above, the Commission has often been guided by the following language in the case of Pan-American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. 1 M.C.C. at 203.

32. First, the Commission finds that the record demonstrates that there is a need for the proposed service that is not being met under existing circumstances. Over 10 shipper witnesses appeared on behalf of the Applicant and testified to a need for garbage service. In addition, it was noted that a school in Carbon County was without garbage service, forcing the parents of the students to share disposal duties. Further, in less than six months of service, Waste Away acquired 145 accounts within a 10-mile radius

of Red Lodge, only six of which were accounts previously held by D&F. This kind of response demonstrates unmet need, and indicates a strong likelihood that there are residents outside the 10-mile radius who would welcome a new garbage service.

33. On March 19, 1984, the Commission issued an order in In the Matter of the Application of Calvin K. Greenup, Docket No. T-7283, Order No. 4853a. In that order the Commission, by determining the population of the area in question and assuming 2.7 persons per household, concluded that there was a disproportionate amount of private hauling, indicating a need that was not being met by the for-hire carrier. The same analysis may appropriately be applied in this case. Tom Higham testified that there are 2,000 to 4,000 residents of Carbon County who live outside of communities that provide garbage service. Using the lower number, and assuming 2.7 persons per household, there are approximately 750 residences in Carbon County which do not receive municipal garbage service.

D&F (less than 250 accounts) and Waste Away (145 accounts) together serve less than 400 households. Acknowledging that there are some people who would never pay for garbage service, the Commission finds that there are at least a couple of hundred households in Carbon County whose garbage disposal needs are presently not being served by existing carriers.

34. We now turn to the second issue to be addressed in a determination of public convenience and necessity: whether the

proposed service can and will be provided as well by existing carriers? It is clear that D&F has the physical capability to serve all of Carbon County. It is also clear, however, that even though D&F has been serving Carbon County for over 10 years, there are many residents who desire garbage service who are not receiving it. We cannot place all the blame for this service failure on shipper ignorance. The Commission believes that there is an obligation on the part of an existing carrier to market its services somewhat aggressively and to maintain a reasonable degree of visibility. D&F claims that it has met this obligation; but the Commission notes certain facts on the record that indicate otherwise. First, since 1982 D&F's Yellow Pages advertisement has stated that D&F serves a "50 mile radius of Billings." A 50 mile radius of Billings includes only about one-half of Carbon County and does not include Red Lodge. For a shipper in search of garbage service the Yellow Pages are a logical place to look, yet for several successive years D&F ran an ad in those pages which failed to notify a significant number of potential customers of its services. Second, D&F has advertised in the Carbon County News, the only county-wide newspaper, only once in the past year. Third, and perhaps most significant, D&F has approximately 250 accounts in Carbon County, a number that has stabilized over the past several years. Waste Away, on the other hand, has managed to garner over 140 accounts in D&F's service area in less than six months. Taken

together these two facts reveal an indifference on the part of D&F in acquiring new business in Carbon County. Therefore, the Commission concludes that D&F has not met and is not willing to meet the garbage service needs of the area in question. As far as Protestant Karl Gaustad, his lack of willingness to serve Carbon County is made manifest by the fact that he has not had an account there in over 10 years.

35. The third issue to be addressed when considering public convenience and necessity is whether or not the proposed service would endanger the operations of existing carriers contrary to the public interest. Granting the present application would pose very little, if any, threat to existing carriers. Protestant Gaustad does not serve Carbon County and thus would lose nothing if the application were granted. A very small percentage of D&F's business is derived in Carbon County. In the worst case, if granting the present application resulted in D&F losing all of its Carbon County customers, there would be little threat posed to D&F as a viable garbage carrier. However, there is no reason to assume that D&F will lose customers in Carbon County simply because Waste Away is granted county-wide authority. The Commission finds that any damage to D&F because of the granting of this application will be more than outweighed by the benefit to the public from the increased service.

36. Finally, the Commission must address the second issue identified in paragraph 29, often considered under the rubric of whether the Applicant is fit to provide the service applied for.

Several factors need to be considered in making a determination of fitness: first, the financial condition of the applicant; second, the intention of the applicant to perform the service sought; third, the experience of the applicant in conducting the service sought; fourth, the adequacy of the equipment the applicant has to perform the service; fifth, whether the applicant has in the past performed illegal operations. The Commission finds the Applicant fit with respect to all of these factors: 1) he has a net worth of close to a half a million dollars with a good credit line; 2) he has the intention to perform the service sought since he needs additional customers to push his business past the break even point; 3) any lack of experience of the Applicant in the garbage business is compensated for by his association with Tom Higham - a man of several years experience in the business; 4) the adequacy of the Applicant's equipment is unquestioned; and 5) there is no evidence that the Applicant has performed illegal operations.

37. In addition to the above, the Commission concludes that the public convenience and necessity in Carbon County would be served by additional competition among garbage carriers. At present there is no county-wide competition to provide garbage service in Carbon County. Karl Gaustad has authority to haul in

part of Carbon County but does not compete for business there. The only area of potential competition is in a ten mile radius of Red Lodge where both D&F and Waste Away have authority. The Commission recognizes that there are cases where additional competition will not be in the public interest. See e.g., In the Matter of the Application of Rozel Corporation, Docket No. T-8205, Order No. 5319. Whether competition is needed and beneficial to the public interest must be determined on a case by case basis. In this case there is little likelihood that additional competition will be destructive; only a small percentage of D&F's business is susceptible to competition in Carbon County. There is a strong possibility, however, that additional competition will have a positive effect. First, though the record does not indicate that D&F's rates are excessive, competition will help ensure that garbage rates in Carbon County remain reasonable. Second, competition should help produce a more aggressive solicitation of accounts and increased public awareness that garbage service is available. This should reduce the amount of private garbage hauling in Carbon County. In short, the Commission sees nothing detrimental to the public interest from additional competition in the garbage hauling business in Carbon County.

38. In summary, the Commission finds the following: 1) there is a need for additional garbage service in Carbon County; 2) existing carriers are unwilling to meet that need; 3) existing

carriers will not be damaged by the introduction of the proposed service; 4) the Applicant is fit, willing, and able to provide the service applied for; and 5) additional competition in the garbage business in Carbon County will further the public interest.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.

3. Section 69-12-323(2), MCA, requires that "public convenience and necessity" be shown prior to the granting of additional operating authority in an area.

4. Section 69-12-323(2)(b), MCA, authorizes the Commission to consider competition in determining public convenience and necessity.

5. Following hearing on the application and based upon the evidence in the record and further giving consideration to the need for competition, the Commission concludes that public convenience and necessity require the granting of the application herein.

ORDER



NOW THEREFORE IT IS ORDERED that the application of Tom Averill, d/b/a Waste Away for a Certificate of Public Convenience and Necessity authorizing the transportation of garbage and solid waste, Class D, is granted as follows:

Garbage and solid waste, Class D, within all points and places in Carbon County.

IT IS FURTHER ORDERED that the issuance of a Certificate of Public Convenience and Necessity in this Docket is contingent upon the surrender of Certificate No. 5718, presently owned by Tom Higham and leased to Applicant Tom Averill.

IT IS FURTHER ORDERED that the Applicant must within thirty (30) days of the mailing of the notice of the rights herein granted, comply with all rules and regulations of the Montana Public Service Commission.

DONE AND DATED this 16th day of December, 1985 by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

---

CLYDE JARVIS, Chairman

---

HOWARD L. ELLIS, Commissioner

---

TOM MONAHAN, Commissioner

---

DANNY OBERG, Commissioner

ATTEST:

Trenna Scoffield  
Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

